Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TONY RAVELO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR TONY RAVELO
2222 PONCE DE LEON BLVD, SUITE 500
CORAL GABLES, FLORIDA 33134
TELEPHONE: (305) 444-1400

37pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Eleventh Circuit's opinion in the instant case regarding the enhancement of the Petitioner's sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in ***Apprendi v. New Jersey,*** 530 U.S. __, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), where: ***(A)*** the Indictment did not charge the Petitioner with conspiring to import over five (5) kilograms of cocaine, ***(B)*** the trial court directed the jury not to determine the quantity of cocaine, and ***(C)*** the Petitioner received a life sentence through the application of the enhanced penalty provisions of 21 U.S.C. § 960(b)(1)(B) which require a factual finding that the Petitioner conspired to import over five (5) kilograms of cocaine?

II. Whether an Indictment that does not allege the minimum quantity of drugs required under the charging statute fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment may be increased from a maximum of 40 years to life imprisonment based solely

upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to import five (5) kilograms of more of cocaine?

III. Whether a trial court must sentence a defendant whose drug conviction violates ***Apprendi v. New Jersey,*** 530 U.S. __, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

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OPINIONS BELOW

The unreported opinion of the Eleventh Circuit was entered on July 31, 2000. (Pet. App. 27-43). The Eleventh Circuit's unpublished order entitled "On Petition(s) for Rehearing and Suggestion(s) for Rehearing En Banc," was entered on September 8, 2000 (Pet. App. 58), and the Eleventh Circuit's Mandate issued on September 20, 2000. (Pet. App. 59).

The appeal to the Eleventh Circuit arose from the Petitioner's Judgment and Commitment entered on August 27, 1998, after a jury trial. (Pet. App. at 12-26).

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 31, 2000. A timely Petition for Rehearing *En Banc*, was filed on August 20, 2000, and on September 8, 2000, the Eleventh Circuit entered an order denying the Petition for Rehearing *En Banc*. (Pet. App. at 58). Thereafter, on September 20, 2000, the Eleventh Circuit issued a Mandate on its Judgment. (Pet. App. at 59).

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 952(a)
Importation of Controlled Substances - Excerpt [1]

(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that . . . [certain listed substances][2] . . . may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium . . . .

21 U.S.C. § 960. Prohibited acts A - Excerpt [3]

(a) Unlawful acts

Any person who--

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or

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[1] The exceptions were omitted from this Excerpt. For the full text of 21 U.S.C. § 952, see Pet. App. at 60-61.

[2] See, Pet. App. at 60-61.

[3] Only an except regarding the penalty provisions for cocaine violations are set forth herein. For the full text, see Pet. App. at 62 -68.

exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving--

* * *

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 50 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

* * *

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. Any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under

this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(2) In the case of a violation of subsection (a) of this section involving--

* * *

(B) 500 grams or more of a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 5 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

* * *

the person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that

authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this paragraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug

product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or flunitrazepam, the person committing such violation shall, except as provided in paragraphs (1), (2), and (4), be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior

sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * *

21 U.S.C. § 963. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 2D1.1[4]

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy. *See, Pet. App. at* ____ - ____.

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[4] The text of U.S.S.G. § 2D1.1covering cocaine offenses is reproduced in Petitioner's Appendix at pp. ___ -___.

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

TONY RAVELO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Tony Ravelo, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on July 31, 2000, and Order entered on September 7, 2000, denying his Petition for Rehearing and Suggestion for Rehearing *En Banc.* Said Petition specifically requested a rehearing as to the quantity of drugs attributed to *Ravelo* in light of this Court's opinions in ***Apprendi v. New Jersey,*** 530 U.S. __, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). (See, Pet. App. at 27-43).

STATEMENT OF THE CASE

A. *Proceedings in the Courts Below:*

The second superseding indictment upon which Petitioner *Ravelo* was tried,[5] like all earlier indictments, alleged in Count I that the defendants conspired to import an unspecified "measurable amount" of cocaine in violation of Title 21 U.S.C. § 952, all in violation of Title 21 U.S.C. § 963.[6]

After the trial court instructed the jury, *inter alia,* that the Government was not required to prove the actual amount of cocaine that was the subject of the offense, the jury convicted *Ravelo* of the conspiracy to import.[7] (R11-797). The trial court subsequently sentenced *Ravelo* on August 26, 1998, under U.S.S.G. Criminal History Catetory I, to life imprisonment pursuant to Title 21 U.S.C., § 960(b)(1)(B), based upon the trial court's finding by

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[5] Second Superseding Indictment filed on October 30, 1997. (Pet. App. at 7-11).

[6] The sentencing provisions for Sections 952 and 963 are set forth in Title 21 U.S.C., § 960. (See Pet. App. at 62-68).

[7] At trial, *Ravelo* counsel presented an entrapment defense, and additionally argued that he was not guilty because the proof at trial showed multiple conspiracies, because he withdrew or terminated the initial conspiracy for 800 to 1,000 kilograms, and was further coerced and placed under duress to continue to engage in a smaller conspiracy involving 300 to 365 kilograms of cocaine. (R10-549-54, R10-561-66).

a "preponderance of the evidence," that *Ravelo* intended to and agreed to import over five (5) kilograms of cocaine. (R1-159, R12-80-81).

Without oral argument, the court of appeals affirmed *Ravelo's* conviction and sentence,[8] and denied his Petition for Rehearing and Suggestion for Rehearing *En Banc,* in which *Ravelo* urged the Eleventh Circuit to apply this Court's rulings in ***Apprendi*** and ***Jones*** to the trial court's findings regarding the quantity of cocaine attributable to *Ravelo.* (Pet. App. at 27-43).

B. ***Statement of Facts:***

On April 19, 1996, while working as a confidential informant using the name Elogio Dominquez, Jesus Vasquez met with Orlando Concepcion at the warehouse of New Wave Marina in

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[8] See Eleventh Circuit opinion at sections "H" and "I." (Pet App. at 39-42). *Ravelo* argued at sentencing and in his brief that he should be held responsible for a lesser quantity of drugs, because the case involved a dry conspiracy in where *Ravelo* ceased activity before the commission of substantive act of importation was committed, which was over one year before his arrest. The original indictment charging the dry conspiracy was filed on September 19, 1996, and the United States did not seek an arrest warrant for *Ravelo* until thirteen months later in November, 1997. Twelve days after the arrest warrants were issued in Alabama, *Ravelo* was arrested in Miami, Florida, where he resided. (R1-7,8,9,10, Pet. App. at 1-11).

Miami, Florida.[9] During this meeting, Concepcion told Jesus Vasquez that he was looking for a way to transport cocaine into the United States. (R6-57,58,102).

On April 22, 1996, Jesus Vasquez again met with Orlando Concepcion, and explained the general plan for importing cocaine from Panama. (R8-289). Guerrero said that he could use a company boat to bring the drugs into the country, and they agreed that Concepcion would introduce Guerrero to his partner. (R8-289).

The next day, Concepcion introduced Jesus Vasquez to *Tony Ravelo* at the New Wave Marina. (R6-61-64; R8-289). Miguel Cabal was present at the marina, and they discussed preparations for the importation of cocaine from the Republic of Panama. (R6-63,64).

Thereafter, during another meeting at the New Wave Marina, Jesus Vasquez introduced a second cooperating informant, Joel Guerrero, to Orlando Concepcion and *Mr. Ravelo*. (R6-65). Guerrero was using the name Rauol Rodriguez. (R6-102). During this meeting, further plans were discussed for the transportation of the cocaine. The plans called for Guerrero's bosses to provide a 165 foot vessel with a "ramp" for the loading of a smaller cocaine laden boat

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[9] The actual name for the marina was the New Way Marina, and it was located at 3582 N.W. 82nd Street, Miami, Florida. Orlando Concepcion's automotive and truck shop is at 2503 N.W. 27th Avenue, Miami, Florida. (R7-147; R10-541).

onto the larger vessel. (R6-65-66).

At another meeting during the latter part of May, 1996, Concepcion and *Ravelo* requested Vasquez to install motors on a 33 foot Donzi pleasure boat. (R6-66). According to Vasquez, the Donzi vessel was to be used for the transportation of the cocaine from Panama. (R6-67). During this meeting, a trip was also planned for *Ravelo* and Guerrero to travel to Mobile, Alabama to meet with undercover Agent James Tanner of the United States Customs Service. (R6-68-69). Agent Tanner was posing as Jamie Rivera, the owner of a small cargo freight company that had 150 to 200 foot vessels operating along the Gulf Coast and in Central and South America. (R7-160-61).

On May 23, 1996, *Ravelo* and Guerrero flew to Mobile, Alabama airport to meet with Agent Tanner, who was accompanied by Special Agent Soto. (R7-158). After meeting at the airport, they went to a restaurant for lunch where they had a casual meeting, discussing their backgrounds and general boating topics. (R6-160). *Mr. Ravelo* portrayed himself to the undercover agents and informant as an experienced smuggler. (R7-162).

This meeting continued at the Ramada Inn Hotel in a room that was being both audio and video taped.[10] During this meeting, *Ravelo* continued to

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[10] Over defense counsel's continuous objections, only a portion of this transcript was played to the jury. (R7-163-66,168, Govt Ex. 11, 11T).

portray himself as an experienced smuggler. Tanner asked for an advance of $35,000 for expense money, and *Ravelo* stated he could give him $50,000. (R7-188) However, no such amounts were ever delivered to Agent Tanner. At the conclusion of the May 23rd meeting, undercover Agent Tanner drove *Ravelo* and the informant to the airport. (R7-190).

After *Ravelo* and Guerrero returned to Miami, Florida from the trip to Mobile, Jesus Vasquez stated that he met with Orlando Concepcion and Concepcion told him that "everything was taken care of" and that a second vessel, allegedly containing hidden compartments under the floors, had to be finished in order to do the trip. (R6-70,71). Vasquez explained that Concepcion, Miguel Cabal and *Ravelo* were working on this second boat. (R6-71, 73). Vasquez provided a sketch of this boat to Agent Tanner which Vasquez' daughter drew. (R6-72; R7-146; Govt. Ex. 1).

Around June 12, 1996, Agent Tanner sent sketches of the deck, top view and side view of the cargo vessel to *Ravelo*. (R7-191-92; Ex. 27). On July 12, 1996, after receiving the sketches, *Ravelo* told Tanner over the telephone that he needed larger scale drawings. (R7-194). When Tanner said that he did not have anything larger, *Ravelo* said that he would work with what he had. (R7-194). Thereafter, on July 26, 1996, Tanner sent *Ravelo* photographs of the cargo vessel. (R7-194).

Ravelo testified at trial that he did not work on the vessel during the summer, (R10-559), and avoided

undercover Agent Tanner's calls, even though the endeavor was supposed to be completed in July, 1996, because he did not want to go through with the deal. (R10-561-64). Rather, *Ravelo* explained that he spent the summer doing fatherly things with his son. (R10-559).

Ravelo further testified at trial that as a result of his failure to complete the deal in the summer, during a meeting with informant Joel Guerrero in September, 1996, Guerrero told *Ravelo* that he has put him [Guerrero] on the spot with people who are not "pussy footing around." Guerrero warned *Ravelo* that these people were "for keeps," and would "go to any length or extent to get even" if *Ravelo* failed to perform. Guerrero further told *Ravelo* that he caused Tanner to incur a lot of expense, made them "get this vessel, you've seen their face. You can recognize them at any given time. And they are very mad because they are now believing that you may be a snitch or a Government informant of some kind." (R10-566). Guerrero conveyed that Tanner stated that if *Ravelo* did not complete the job, that he "is going to take action against Mr. Guerrero, my family and myself *[Ravelo]*." *Id.*

Also in September, 1996, Vasquez went to the New Wave Marina warehouse, and observed a Gulfstream fishing boat that Alejandro Torres brought to the warehouse. (R6-79-81, Govt. Ex. 5). At the time Torres delivered the Gulfstream boat, only Concepcion and Cabal were present. (R6-81). According to Vasquez, the Gulfstream boat was at the

warehouse for approximately one week, and during that time, it was simply polished. (R6-82).

The next conversation Agent Tanner had with *Mr. Ravelo* was on September 23, 1996. *Ravelo,* who was in Miami, called Tanner in Mobile, Alabama and engaged in a short conversation for the purposes of setting up another meeting. (R7-197-99; Govt Ex. 12,12T).

Thereafter, on October 1, 1996, the informant, Guerrero, and *Ravelo* traveled to Mobile to meet with Agent Tanner. (R7-201). Upon arriving, Tanner, who was wearing a body recorder, drove Guerrero and *Ravelo* to a restaurant. (R7-201).[11]

At trial, Agent Tanner acknowledged that during this October 1, 1996 meeting, *Ravelo* abandoned the 800 to 1,000 kilogram conspiracy, and discussed a new venture involving approximately 350 kilograms and using smaller boats. (R7-210,245).

Tanner explained that he and *Ravelo* discussed other details of the new smaller smuggling venture, such as Tanner's price to transport the cocaine [illegible]den vessel, the use of a blonde individual on the boat who would not look Spanish, alternative sources of cocaine, and the weather and sea conditions in Mobile, Alabama. (R7-211-217). According to Tanner, *Ravelo* also mentioned that he had a vessel that belonged to "Alex" that could be used in the

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[11]Over *Ravelo's* objection, only a portion of the recorded conversations were admitted and played before the jury. (R7-202-206; Govt Ex. 14, 14T).

venture as a decoy vessel. (R7-218). *Ravelo* also told Tanner that Alex had nothing to do with the smuggling venture. (R7-222).

At the conclusion of the meeting, Agent Tanner drove *Ravelo* and the informant, Joel Guerrero, back to the airport. During the ride, *Ravelo* provided $15,000 for the expenses that Tanner had incurred thus far. (R7-222; Govt. Ex. 13). *Ravelo* also indicated that he would be traveling to Panama to finalize the deal, and would thereafter return to Mobile within "ten days," because he wanted to see the marina where the boat he was bringing from Miami would be launched. (R7-223). However, *Mr. Ravelo* never returned or called Agent Tanner. (R7-224,226,231).

Thereafter, Vasquez testified[12] that on November 5, 1996, he met with Torres, Concepcion and informant Guerrero at the New Wave warehouse and "gave strict orders for Orlando [Concepcion] to get in touch with *Tony [Ravelo]*." (R6-84). In addition, Vasquez claimed that November 5, 1996, Alex Torres told him and Guerrero that the Gulfstream boat would be going to Panama. (R6-85). Afterwards, Concepcion contacted *Ravelo*, and then "they took the boat away." (R6-84). However, Vasquez acknowledged that he never saw who removed the boat. (R6-84).

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[12] However, Mr. Vasquez had no recollection of the events during that meeting, and, over the defendants' objections, refreshed his recollection from the notes. (R6-82-84).

On November 14, 1996, Agent Tanner called *Ravelo* to find out what was going on, and *Ravelo* said that he was going back to Panama to get the load ready. According to Tanner, prior to this call, he (Tanner) tried to reach *Ravelo* several times in Panama and left messages for him in Miami. (R7-224; Govt. Ex. 15,15T). Moreover, after Tanner made this call, *Ravelo* never attempted to contact him again. (R7-231).

Testimony of Special Agent, Joseph Goulet

At trial, Agent Goulet testified that he examined three vessels seized at the time of the arrest of the defendants on October 29, 1997 – 13 months after the original indictment was filed. (R1-1,23,29). The Government offered no testimony or evidence to show that one of the vessels, a "Star Fire," which was seized from defendant Torres' property at the time of his arrest on October 29, 1997, was part of the conspiracy charged in the instant indictment. Based upon this lack of evidence, defense counsel vigorously objected to any testimony regarding the Star Fire.[13]

---

[13]Defense counsel also asserted that the Government failed to provide any notice as required under Federal Rule of Evidence 404(b) that any such evidence would be offered at trial. (R9-424). Nevertheless, the District Court denied defense counsel's objections, ruling that such was not 404(b) evidence. (R9-424).

ARGUMENT I

BEFORE INCREASING A DEFENDANT'S STATUTORY MAXIMUM SENTENCE FROM FORTY YEARS TO LIFE IMPRISONMENT ON THE BASIS OF THE QUANTITY OF ILLEGAL DRUGS A DEFENDANT A CONSPIRED TO IMPORT IN A DRY CONSPIRACY, THE PROSECUTION MUST PROVE THE QUANTITY OF ILLEGAL DRUGS BEYOND A REASONABLE DOUBT TO A JURY.

A. Under The Due Process Clause Of The Fifth Amendment And The Notice And Jury Trial Guarantees Of The Sixth Amendment Any Fact (Other Than Recidivism), That Increases The Maximum Penalty For A Crime, Including The Quantity of Illegal Drugs That A Defendant Agreed to Import, Must Be Charged In An Indictment, Submitted To A Jury And Proven Beyond A Reasonable Doubt.

The Eleventh Circuit's affirmance of *Ravelo's* conviction and sentence, and denial of his Petition for Rehearing and Rehearing *En Banc,* directly conflict with the decisions of this Court in ***Apprendi v. New Jersey,*** 530 U.S. _, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In ***Apprendi,*** this Court squarely held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum

must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* - U.S. at _, 120 S.Ct. at 2362-63.

After the Eleventh Circuit affirmed *Ravelo's* conviction and sentence and denied his petition for rehearing and suggestion for rehearing *en banc,* this Court reversed and remanded numerous drug cases for reconsideration in light of ***Apprendi.***[14] See note 14 below. Like the cases this Court has reversed and remanded for further consideration, the indictment in this case failed to charge the threshold amount of cocaine necessary to support the enhanced penalty provisions of the charging statute, and the jury

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[14] The following drug cases were reversed and remanded for further consideration in light of ***Apprendi: United States v. Humphrey,*** 210 F.3d 373 (6th Cir.2000)(unpublished)(trial court properly calculated of amount of cocaine), *rev'd,* 121 S.Ct. 478, - L.Ed.2d - (Nov.13, 2000); ***United States v. Whitt,*** 211 F.3d 1022 (7th Cir.2000)(sustained trial court's findings regarding quantities of drugs based upon witness testimony at trial), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States v. Hughes,*** 213 F.3d 323 (7th Cir. 2000)(same), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States v. Smith,*** 215 F.3d 1331 (7th Cir. 2000)(type and quantity of drugs sentencing factors), *rev'd,* - U.S. -, 121 S.Ct. 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Hester,*** 199 F.3d 1287 (11th Cir.2000)(amount of marijuana involved not an element of offense that gov't had to prove beyond a reasonable doubt), *rev'd,* - U.S.-, 121 S.Ct 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Jones,*** 194 F.3d 1178 (10th Cir. 1999)(a sentencing judge can consider quantities of drugs not charged in information or indictment or proven at trial when determining sentence, and quantities proven at trial do not dictate mandatory minimum), *rev'd,* - U.S. -, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000).

instructions and verdict form failed to direct the jury to make a factual finding beyond a reasonable doubt as to the quantity of drugs that *Ravelo* conspired to import.[15] (R1-1,4,17; Ct. Ex. 1-3). Accordingly, at the minimum, this Court should reverse and remand this case for further consideration in light of ***Apprendi*** and ***Jones.***

However, this case also presents this Court with the following issues of national importance:

(a) Whether this Court's holding in ***Apprendi*** *supra,* and/or ***Jones*** *supra*, requires the complete reversal of a conviction due to lack of jurisdiction? and,

(b) Assuming that this Court's holdings in ***Apprendi****, supra,* and/or ***Jones,*** *supra,* only require a

---

[15]The jury instructions in the instant case specifically removed the issue of the quantity of drugs from the jury's consideration. The charge instructed the jury that it only had to find a "measurable amount" of cocaine was involved in the offense, but not more than 800 kilograms of cocaine, as the Indictment charged. The charge provided:

> ***The Government is not required to prove the actual amount of the controlled substance that was the object of the alleged conspiracy.*** The Government must prove beyond a reasonable doubt, however, that a measurable amount of the controlled substance was, in fact, the object of the alleged conspiracy.

(R1-118-15)(emphasis added).

As a result, the jury charge did not require the jury to determine whether a "measurable amount" of cocaine was "5 kilograms or more," -- as is necessary to impose the greater penalty provisions of 21 U.S.C. § 960(b)(1)(B).

the trial court to resentence a defendant whose conviction was obtain in violation thereof, whether the trial court must resentence the defendant to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

(1) The Quantity of Drugs That A Defendant Intended to Import Is An Essential Element of 21 U.S.C. §§ 952 and 960.

In ***Jones v. United States,*** 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), this Court noted that

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id., at 243, n. 6, 119 S.Ct. 1215.

The federal carjacking statute examined in ***Jones,*** set forth a choice of three maximum penalties, two of which were dependent on proof of facts that did not need to be present in the indictment or decided by the jury. 526 U.S. at 229, 119 S.Ct. 1215. The basic statute provided a fine or imprisonment of not more than 15 years for the offense of carjacking, § 2119(1), but if serious bodily injury resulted, the

maximum time in prison was 25 years, § 2119(2), and if death resulted, the maximum was life imprisonment, § 2119(3).

Similarly, in the instant case, Title 21 U.S.C. § 960(b)(1), requires a factual finding to determine if the violation of the applicable statute set forth in subsection (a) involved 5 kilograms or more of cocaine under subsection (b)(1)(A), or over 500 grams but less than 5 kilograms of cocaine under subsection (b)(1)(B). See, Pet. App. at 62-68.

Furthermore, like the indictment in Jones's case, which made no reference to the subsections of the statute, nor did it charge either that the defendant had inflicted serious bodily injury on the victim or death, the indictment herein wholly fails to identify the penalty provisions imposed after trial. *Ravelo's* Indictment not only failed to identify which paragraph of section 960 the government sought to impose, it failed to cite to section 960 altogether, and further failed to state any specific quantity of cocaine that *Ravelo* conspired to import. (R1-17).

The lower courts in ***Jones*** held that the additional facts that triggered § 2119(2) and (3) were nonetheless sentencing factors, but the Supreme Court reversed, holding that the Fifth Amendment Due Process Clause of the Fifth Amendment and Sixth Amendment notice and jury trial require any fact other than a prior conviction[16] that increases the maximum penalty for a crime must be charged in an indictment,

---

[16] *Ravelo* had no prior conviction.

submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n. 6, 119 S.Ct. 1215. *Id.* at 249, 119 S.Ct. 1215.

(2) The failure of an Indictment to Charge an Essential Element of and Offense, Requires Reversal of a Conviction.

The requirement that an indictment contain all the elements of the offense provides a defendant with notice and protection from double jeopardy. See Const. Amd V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"); Const. Amd. VI ("the accused shall enjoy the right ... to be informed of the nature and cause of the accusation"). An indictment also "limit[s] [the defendant's] jeopardy to the offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." ***Stirone v. United States,*** 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Furthermore, the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship,*** 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Recently, the Second Circuit examined this issue in the context of the federal firearm statute where the defendants plead guilty to the simple firearms offense, but were enhanced one conviction for discharge of a firearm and imposed a 10 year

consecutive sentence for violation of § 924(c) in connection with a different bank robbery. Instead of merely reversing for resentencing, the court remanded for resentencing or reindictment. ***United States v. Tran,*** - F.3d -, 2000 W.L. 1701651 (2d Cir., Nov. 15, 2000). The indictments in ***Tran*** charged the defendants with a simple § 924(c) firearms offense, to which the defendants plead guilty. *Id.* at 10. Recognizing that the notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal courts is long established, the Second Circuit held that the district court acted outside its jurisdiction in sentencing the defendants for the enhanced firearms offenses not charged in their indictments. ***Tran,*** at 6, 10, *citing,* ***Ex parte Bain,*** 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)(indictment found by a grand jury indispensable to the power of the court to try defendant for crime charged).

Similarly, the indictment the grand jury returned against *Ravelo* in the instant case, failed to set forth any notice that the enhanced penalty provisions of § 960 by either citing to the statute or specifying the quantity of cocaine that the grand jury found that *Ravelo* conspired to import. Accordingly, the district court was without jurisdiction to try or sentence *Ravelo,* because the grand jury did not charge *Ravelo* with an essential element of the offense charged.

B. Alternatively, Where a Defendant's Drug Conviction Violates *Apprendi* or *Jones*, The Defendant Should Be Resentenced To The Lowest Level Under The United States Sentencing Guidelines For The Drug Specified in the Indictment and Charging Statute.

As set forth in the points above, in instances such as the instant case where the Indictment fails to allege the penalty provision which would provide the trial court with jurisdiction to impose a minimum mandatory sentence or the quantity of drugs specified in said statute, then the trial court is without jurisdiction to sentence (as well as convict), the defendant.

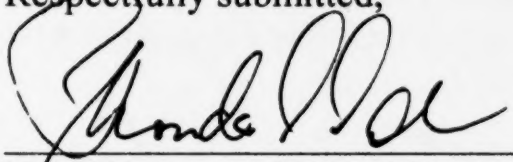
In the event this Court does not rule that the indictment must be dismissed, the Petitioner submits that inasmuch as the petit jury found him guilty of a cocaine conspiracy for an unstated quantity of cocaine, that the trial court would only have authority to sentence him to the lowest quantity of cocaine specified in the United States Sentencing Guidelines.

Accordingly, *Ravelo* submits that the highest base offense level applicable, would be a level 12. See, Pet. App. at 86.

CONCLUSION

For all the foregoing reasons, therefore, *Tony Ravelo* respectfully submits that this Court should grant this Petition for Certiorari.

Respectfully submitted,



RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
Counsel for *Tony Ravelo*
2222 Ponce De Leon Boulevard
Suite 500
Coral Gables, Florida 33134
Florida Bar No. 708038
Telephone: (305) 444-1400
Facsimile: (305) 444-1487

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 6th day of December, 2000, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Charles A. Kandt, Esq.,*** Assistant U. S. Attorney, 63 South Royal Street, Riverview Plaza, Suite 600, Mobile, Alabama 36602.

RHONDA A. ANDERSON, ESQ.
Rhonda A. Anderson, P.A.
Counsel for *Tony Ravelo*
2222 Ponce De Leon Boulevard
Suite 500
Coral Gables, Florida 33134
Florida Bar No. 708038
Telephone: (305) 444-1400
Facsimile: (305) 444-1487

(2)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TONY RAVELO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR TONY RAVELO
2222 PONCE DE LEON BLVD, SUITE 500
CORAL GABLES, FLORIDA 33134
TELEPHONE: (305) 444-1400

51 pp

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Rhonda A. Anderson, Esq.
Rhonda A. Anderson, P.A.
Counsel for *Tony Ravelo*
2222 Ponce De Leon Blvd.
Suite 500
Coral Gables, Florida 33134
Florida Bar No. 708038
Telephone: (305) 444-1400
Facsimile: (305) 444-1487

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
CRIMINAL NO. 96-00181
USAO NO. 96R0310H

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONY RAVELO, ORLANDO CONCEPCION, and MIGUEL IGNACIO CABAL,

Defendants.

Violations:
21 USC 963
21 USC 952(a)
18 USC 2

THE GRAND JURY CHARGES:

INDICTMENT

Beginning in or about April, 1996, the exact dates being unknown to the Grand Jury, and continuing to the present, in the Southern District of Alabama, Southern Division,

TONY RAVELO
ORLANDO CONCEPCION, and
MIGUEL IGNACIO CABAL

did willfully, knowingly and unlawfully combine, conspire, confederate and agree with each other and with divers other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against

the United States of America, to-wit:

> knowingly and intentionally unlawfully import more than eight hundred kilograms of cocaine, a Schedule II controlled substance, into the United States of America from the Republic of Panama, in violation of Title 21, United States Code, Section 952(a).

It was part of said conspiracy that the defendants would themselves or through divers other persons as known and unknown times and places, obtain cocaine in the Republic of Panama and transport the cocaine into the United States by concealing the cocaine within a recreational speed boat, which would be manufactured in the United States with hidden compartments, exported to the Republic of Panama, and then returned to the manufacturer with cocaine hidden within, in violation of Title 21, United States Code, Section 963 and Title 18, United States Code, Section 2.

A TRUE BILL

FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

J. DON FOSTER
UNITED STATES ATTORNEY
by:

Charles A. Kandt
Assistant United States Attorney

E.T. Robinson Jr.

E.T. Robinson, Jr.
Assistant United States Attorney
Chief, OCDETF Division

SEPTEMBER 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CRIMINAL NO. 96-00181
USAO NO. 96R0310H

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONY RAVELO, ORLANDO CONCEPCION, MIGUEL IGNACIO CABAL, and ALEJANDRO TORRES, a.k.a. ALEX,

Defendants.

Violations:

21 USC 963
21 USC 952(a)
18 USC 2

THE GRAND JURY CHARGES:

SUPERSEDING INDICTMENT

Beginning in or about April, 1996, the exact dates being unknown to the Grand Jury, and continuing to the present, in the Southern District of Alabama, Southern Division,

TONY RAVELO
ORLANDO CONCEPCION,
MIGUEL IGNACIO CABAL, and
ALEJANDRO TORRES, aka ALEX,

did willfully, knowingly and unlawfully combine,

conspire, confederate and agree with each other and with divers other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against the United States of America, to-wit:

> knowingly and intentionally unlawfully import more than eight hundred kilograms of cocaine, a Schedule II controlled substance, into the United States of America from the Republic of Panama, in violation of Title 21, United States Code, Section 952(a).

It was part of said conspiracy that the defendants would themselves or through divers other persons as known and unknown times and places, obtain cocaine in the Republic of Panama and transport the cocaine into the United States by concealing the cocaine within a recreational speed boat, which would be manufactured in the United States with hidden compartments, exported to the Republic of Panama, and then returned to the manufacturer with cocaine hidden within, in violation of Title 21, United States Code, Section 963 and Title 18, United States Code, Section 2.

A TRUE BILL

_____

FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

J. DON FOSTER
UNITED STATES ATTORNEY
by:

_____

Charles A. Kandt
Assistant United States Attorney

E.T. Robinson Jr./by Richard W. Moore NOVEMBER 1996
E.T. Robinson, Jr.
Assistant United States Attorney
Chief, OCDETF Division

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
CRIMINAL NO. 96-00181
USAO NO. 96R0310H

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONY RAVELO, ORLANDO CONCEPCION, MIGUEL IGNACIO CABAL, and ALEJANDRO TORRES, a.k.a. ALEX,

Defendants.

Violations:

21 USC 963
21 USC 952(a)
21 USA 846
18 USC 2
18 USC 853

THE GRAND JURY CHARGES:

SECOND SUPERSEDING INDICTMENT

Count One

Beginning in or about April, 1996, the exact dates being unknown to the Grand Jury, and continuing to the present, in the Southern District of Alabama, Southern Division,

TONY RAVELO
ORLANDO CONCEPCION,
MIGUEL IGNACIO CABAL, and
ALEJANDRO TORRES, aka ALEX,

did willfully, knowingly and unlawfully combine, conspire, confederate and agree with each other and with divers other persons whose names are to the Grand Jury known and unknown, to commit certain offenses against the United States of America, to-wit:
knowingly and intentionally unlawfully import more than eight hundred kilograms of cocaine, a Schedule II controlled substance, into the United States of America from the Republic of Panama, in violation of Title 21, United States Code, Section 952(a).

It was part of said conspiracy that the defendants would themselves or through divers other persons as known and unknown times and places, obtain cocaine in the Republic of Panama and transport the cocaine into the United States by concealing the cocaine within a recreational speed boat, which would be manufactured in the United States with hidden compartments, exported to the Republic of Panama, and then returned to the manufacturer with cocaine hidden within, in violation of Title 21, United States Code, Section 963 and Title 18, United States Code, Section 2.

Count Two

On October 29, 1997, in the Southern District of Alabama, Southern Division,

ORLANDO CONCEPCION

did wilfully, knowingly and unlawfully attempt to

possess with the intent to distribute a controlled substance, to-wit: possessed approximately Six Kilograms of Cocaine, a Schedule II controlled substance, and attempted to distribute said cocaine to customers in Alabama, knowing the cocaine would be destined for Alabama,

All in violation of Title 21, United States Code, Section 846.

Count Three

Upon conviction of **TONY RAVELO** of a violation of Title 21, United States Code, Section 963, as charged in Count One, which is punishable by imprisonment for more than one year, the United States is entitled to the forfeiture for more than one year, the United States is entitled to the forfeiture of all property of **TONY RAVELO**, constituting or derived from any proceeds the **TONY RAVELO** obtained directly or indirectly, as the result of said violations, and any property which was used, or intended to be used, in any manner or part, to commit or to facilitate the commission of said violations. Such property includes, but is not necessarily limited to, the following:

1. All United States currency which is drug proceeds or intended to facilitate drug transactions;

2. 1994 Porsche 963,
   VIN # WPOAA2969RS820530,
   Florida Registration Number RBH82C;
3. One Vessel, a 26' Gulfstream,
   Florida Registration Number FL2162HW;
4. One Vessel, a 32' Donzi Performer,
   Florida Registration Number FLZK1362G883;

as provided by Title 21, United States Code, Section 853.

If any property described above as being subject to forfeiture pursuant to Title 21, United States Code, Section 853(a), as a result of any act or omission of the defendant

1. Cannot be located upon the exercise of due diligence;
2. Has been transferred or sold to, or deposited with, a third person;
3. Has been placed beyond the jurisdiction of the Court;
4. Has been substantially diminished in value, or
5. Has been commingled with other property which cannot be sub divided without difficulty;

it is the intent of the United States, pursuant to Title 21,

United States Code, Section 853(p), to seek forfeiture of any other property of said defendants up to the value of said property listed above as being subject to forfeiture.

A TRUE BILL

_____

FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

J. DON FOSTER
UNITED STATES ATTORNEY
by:

_____

Charles A. Kandt
Assistant United States Attorney

_____ OCTOBER 1997

Deborah A. Griffin
Assistant United States Attorney
Deputy Chief, Criminal Division
Head of Narcotics

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

CASE NO. 1:96CR00181-001

UNITED STATES OF AMERICA,

v.

TONY RAVELO,

MARCIA SHEIN
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For offenses Committed On or After November 1, 1987)

- ☐ pleaded guilty to count(s) __.
- ☐ pleaded nolo contendere to count(s)__which was accepted by the court.
- ☒ was found guilty on count(s) one (1) of the second superseding indictment after a plea of not guilty.

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count No.(s)**
21 USC§963	Conspiracy to import cocaine	04/30/1996	1

The defendant is sentenced as provided in pages 2 through 6 of the judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) __.

☐ Count(s)__ is/are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security No.: 226-27-1518
Defendant's Date of Birth: 04/14/1953
Defendant's U.S.M. No.: 57845-004
Defendant's Residence Address:
1140 Alfonso Avenue
Coral Gables, FL 33146
Defendant's Mailing Address: Same

8/21/98
Date of Imposition of Judgment

RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

8/27/98
Date

AO 245B(Rev. 8/96)Judgment in a Criminal Case:
Sheet 2-Imprisonment

Defendant: **TONY RAVELO**
Case Number: **1:96CR00181-001**

IMPRISONMENT

THE defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total **term** of **LIFE**.

☐ Special Conditions:

☒ The court makes the following recommendations to the Bureau of prisons:

The court recommends that the defendant be incarcerated near his home at FCI, Coleman Florida, if pissible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ___ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on ___.

- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____

Deputy U.S. Marshal

AO 245B(Rev. 8/96)Judgment in a Criminal Case:
Sheet 3-Imprisonment

Defendant: **TONY RAVELO**
Case Number: **1:96CR00181-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years.**

☐ Special Conditions:

For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

☒ **The defendant shall not possess a firearm as defined in 18 USC § 921.** (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release

that the defendant pay any such time or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if applicable).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the prob. officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the prob. officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or pe4rsonal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B(Rev. 8/96)Judgment in a Criminal Case:
Sheet 5, Part A-Criminal Monetary Penalties

Defendant: **TONY RAVELO**
Case Number: **1:96CR00181-001**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payment set forth on Sheet 5, Part B.

	Assessment	**Fine**	**Restitution**
Totals:	$100.00		

☐ If applicable, restitution amount ordered pursuant to plea agreement. $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of _____.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:
  ☐ The interest requirement is waived.
  ☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below:

** If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. **(Or see attached)**

Name(s) and Address(es) of Payee(s)	***Total Amount of**	**Priority Order or of % of Payment**
TOTALS:	$_____	$_____

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

Defendant: **TONY RAVELO**
Case Number: **1:96CR00181-001**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessments; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- ☒ In full immediately; or
- ☐ $___ immediately, balance due (in accordance with the following): or
- ☐ not later than____; or
- ☐ in installments to commence ___ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

- ☐ in ___ (e.g., equal, weekly, monthly, quarterly) installments of $__ over a period of ___ year(s) to commence ___ days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Special instructions regarding the payment of criminal monetary penalties:
  - ☐ Joint and Several:
  - ☐ The defendant shall pay the cost of prosecution.
  - ☐ The defendant shall pay the following court cost(s):
  - ☐ The defendant shall **forfeit** the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

Defendant: **TONY RAVELO**
Case Number: **1:96CR00181-001**

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report **except:**

1. The two-level enhancement in paragraph #30 for possession of a weapon is not appropriate and not part of the conspiracy. The probation office is to strike the information regarding any weapon.
2. The defendant was involved with at least 150 kilograms of cocaine during the conspiracy, which gives a base of f offense level of 38. This finding is based on trial testimony.
3. The defendant has not accepted responsibility in this case-Paragraph #27 and #35.
4. The defendant has obstructed justice in this case based on his trial testimony-Paragraph #33.
5. The defendant did have a leadership role in the offense which gives a four-level increase-Paragraph #32. The court also finds the conspiracy involved five or more individuals or

was otherwise extensive.

6. Guideline 2X1.1 does not apply to this case. Additionally, the court finds that the conspiracy was continuing and not attempted.

Guideline Range Determined by the Court:

Total Offense level: 43

Criminal History Category: I

Imprisonment Range: __ to LIFE months

Supervised Release Range: __ to 5 years

Fine Range: $25,000.00 to $4,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total amount of Restitution: $0

☐ Restitution is not ordered because of the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order out weighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3663(d).

☐ For offenses committed on or after September 13, 1994, but before April 23, 1996 that require the total amount of loss to be states, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order,

and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

- ☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines. **The sentence imposed addresses the seriousness of the offense and meets the sentencing objectives of deterrence, incapacitation and punishment.**

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

☐ The sentence **departs** from the guideline range:
☐ upon motion of the government, as a result of defendant's substantial assistance, pursuant to 5K1.1
☐ for the following specific reason(s):

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6681
Non-Argument Calendar
District Court Docket No. 96-00181-4-CR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALEJANDRO TORRES a.k.a.
ALEX, TONY RAVELO,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Alabama

July 31, 2000

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Alejandro Torres and Tony Ravelo appeal their convictions and sentences for conspiring to import cocaine in violation of 21 U.S.C. § 952(a), 21 U.S.C. §963, and 18 U.S.C. §2. Finding no reversible error we

affirm.

I. BACKGROUND

According to the evidence introduced at trial, Ravelo and co-defendant Orlando Concepcion owned the New Wave Marina in Miami in Miami. Concepcion told Jesus Vasquez, a marina mechanic, that he and Ravelo needed to do a "big [cocaine-importing] trip," and Vasquez indicated that he knew someone who could do the job. Vasquez then relayed this information to Joel Guerrero, a confidential informant for the U.S. Customs Service, and Jim Tanner, a U.S. Customs agent, and offe5red to cooperate with a government investigation.

Vasquez, Concepcion, Guerrero, co-defendant Migeul Cabal, and Ravelo met a short time later and discussed a plan to import 1,000 kilograms of cocaine into the United States from Panama. Ravelo, Guerrero, Vazquez, and Concepcion met on other occasions to discuss their plan to import cocaine, and Ravelo explained during these meeting what they needed to do to successfully import the cocaine. Also during this time frame, Vasquez observed Ravelo and others installing secret compartments on a boat in the marina warehouse.

Ravelo and Guerrero flew to Mobile, Alabama on May 23, 1996 to meet with Agent Tanner, who was posing as a small cargo freight company owner. During their meeting, Ravelo claimed that he had made a lot of money through the importing business over the past five years, and explained his plan top secret cocaine in a boat in Panama, transfer the cocaine into a second boat off

shore, and then bring the cocaine into the United States aboard the second boat. Ravelo also discussed the size of the shipment, which would be between 800 and 1,000 kilograms.

In September, 1996, Vasquez and Guerrero met Torres at the marina warehouse in Miami, where Torres had brought his Gulfstream fishing boat. Torres told Guerrero that this was the boat that they were "looking for to do business with."

In October, 1996 Tanner, Ravelo, and Guerrero met again in Mobile, where Ravelo explained that he wanted to reduce the amount of cocaine imported to 350-365 kilograms. Ravelo also indicated to Tanner that Torres had an appropriate vessel (i.e., a vessel similar to the vessel in Panama which would be loaded with cocaine), and that he had paid Torres to use the vessel in this deal. At the end of this meeting, Ravelo gave Tanner $15,000 in cash for expenses incurred, and gave Tanner a business card with Ravelo's contact information in Panama.

Ravelo never returned to Mobile and Tanner spoke with Ravelo for the last time in November, 1996. In that conversation, Ravelo indicated that the scheme was delayed due to problems in Panama and that he would contact Tanner again when he had a date when they could proceed. In November, 1996, Torres told Guerrero that Ravelo had delayed completing the scheme because of problems he was experiencing with the boat in panama. In March, 1997, Torres told Guerrero that

the deal was going to happen but that he needed to make repairs on a boat that would be used during the trip.

Torres and Ravelo were arrested in October, 1997. The government seized two vessels - a Gulfstream and a Starfire - from Torre's property upon his arrest. The Gulfstream could conceal 240 kilograms of cocaine, and the Starfire could conceal 320 kilograms of cocaine. Ravelo was found in possession of $230,000 cash on his person and in his residence at the time of his arrest.

Ravelo testified on his own behalf at trial. He admitted that he had spoken about smuggling cocaine into the United States, but claimed that he had attempted to abandon the idea by informing Guerrero that the deal was off and by selling his marina business in November, 1996. He also stated that he had spoken with Torres about buying the Gulfstream boat in September, 1896, but that he had never spoken with Torres about smuggling cocaine into the United States. The jury found both defendants guilty of conspiring to import cocaine.

II. DISCUSSION

A. Did the District Court Abuse its Discretion By Admitting Evidence Regarding the Starfire Vessel?

Torres objected at trial to the government's introduction of evidence regarding the Starfire vessel found at Torres' s home upon his arrest. The government offered the evidence to prove defendant's knowledge of hidden compartments on boats, and to prove Torres's intent with regard to the charged offense.

Ravelo objected based on Federal Rules of Evidence 404(b), and because the evidence would be highly prejudicial. Appellants argue that the judge abused his discretion by admitting the evidence.

We review the district court's evidentiary determination for abuse of discretion. *See United States v. Mills*, 138 F.3d 928,935 (11th Cir. 1998). The district court held the Starfire evidence relevant because it was "evidence that was found at the same time during this investigation," rather than 404(b) evidence. Even if we assume that this ruling was erroneous, without so holding, "[t]his error... was harmless, considering all of the other evidence against [appellants]." *United States v. Chavez*, 204 F.3d 1305,1317 (11th Cir. 2000). Therefore we will not disturb the appellants' conviction on this basis.

B. Did the District Court Impermissibly Bolster a Government Witness's Testimony?

After defense counsel repeatedly phrased questions to a government witness, "Is it correct," or otherwise utilizing the word "correct," the trial judge instructed counsel, "Counsel, let me point something to you. Ask questions, sir. Don't ask if it's correct. If he testifies, it will be correct."[1] Neither defendant objected to this

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[1] Ravelo asserts that the judge's statement, taken literally, indicated the judge's belief that the witness's statements were

instruction.

We review "assertions of error... not objected to at trial for plain error." *United States v. Mitchell*, F.3d 1338, 1342 (11th Cir.), *cert denied*, 525 U.S. 1031 (1998) (quoting *United States v. Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996). "To find reversible error under the plain error standard, we must conclude that (1) the error occurred, (2) the error was plain, and (3) the error affected substantial rights." *Mitchell*, 146 F.3d at 1342. Ravelo assets that the judge's instruction improperly bolstered the credibility of the government witness, and requires reversal. We disagree; assuming without deciding that the instruction was error, it certainly was not plain error, because Rasvelo has not proven that it "affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993); *see also United States v. DeCastro*, 113 F.3d 176, 180 (11th Cir. 1997).

C. Did the District Court Abuse Its Discretion by

"correct." However, when viewed in context, this literal interpretation was not the most likely interpretation. Indeed, neither defendant objected at trial, a fact which indicates that the statement did not strike the attorneys as an impermissible bolstering of testimony at that time. While we hold this statement was not plain error, we by no means encourage statements such as these, and note that in another context the statement could constitute plain error.

Repeatedly Admonishing Defnese Counsel Not to Use the Words "Correct" and "Concede?"

Ravelo argues that the district court judge made "four sharp rebukes"[2] and ten other criticisms of defense counsel, which taken together affected the tenor of the trial to Ravelo's detriment and require reversal. Ravelo has not demonstrated that the "four sharp rebukes" and ten criticisms at issue were "so prejudicial as to amount to a denial of a fair trial." *United States v. Morales*, 868 F.2d 1562, 1576 (11th Cir. 1989). Reversal is therefore unwarranted.

D. Did the District Court Abuse Its Discretion by Preventing Ravelo from Cross-Examining Informants Regarding Arrests, Convictions, and Investigations

---

[2]The four rebukes were:

1. "Counsel, let me ask you not to comment on the answer. Don't say 'correct.' Just ask the question."
2. Sustaining the government's objection on form to Ravelo's lawyer's question, "Would you concede that confidential informants Jesus Vasquez and Joel Guerrero met on different occasions with Mr. Tony Ravelo ...?"
3. "Counsel, don't ask him if he concedes. Ask the question. I don't care whether he concedes or not. The jury doesn't care. Just ask your question, sir."
4. "Counsel, let me point something out to you. Ask questions, sir. Don't ask if it's correct. If he testifies, it will be correct. All right, sir?"

of Criminal Activities not Resulting in an Arrest or Felony Conviction?

The appellants sought to question both confidential into criminal activities, for the purpose of demonstrating bias. Specifically, Torres's counsel asked Guerrero on cross-examination, "Were you ever investigated for a violation of any Federal or state law? The appellants hopes to show through this line of inquiry that the witnesses had motive to lie because they were "working off something," such as a prior crime, in exchange for their testimony and work as confidential informants. The government objected, noting that the Federal Rules of Evidence (Rule 609(a)(2)) only allow for impeaching the credibility of a witness though evidence of felony convictions or convictions of crimes involving dishonesty or false statements. We review the district court's decision for an abuse of discretion. *See United States v. Bulman*, 667 F.2d 1374, 1381 (11th Cir. 1982).

Ravelo properly notes that, "investigation of a witness'[s] credibility through the exposure of his or her bias and motivation is a right guaranteed by the Sixth Amendment's Confrontation Clause ...." *United States v. Gonzalez*, 71 F.3d 819, 835-36 (11th Cir. 1996) (internal quotation omitted). While there is a Constitutional right to adequately cross-examine, the Constitution does not mandate that any particular course of cross-examination be permitted. *See Bulman*, 667 F.2d at 1381 n.9. In *Bulman*, the defendant's Sixth Amendment right to confrontation was satisfied when:

> [A]ppellants had the opportunity to ask [the confidential informant] about his prior convictions, his employment by the DEA, the duration of his employment, the manner and amount of his compensation, and the cases on which he had worked. Since appellants had adequate alternative opportunities to delve into whether there existed any deal between [the informant] an the DEA ... the trial court did not abuse its discretion in refusing to allow inquiry into [the informant's] arrest record.

Id. at 1382.

Here, appellants elicited testimony from the informants revealing the sums of money each was receiving for testifying, the temporary reprieve from deportation received by one of the defendants in exchange for acting as a confidential informant, and the potential additional rewards each could receive. Since ample testimony demonstrated the potential bias which counsel sought to reveal, the district court did not abuse its discretion by limiting defendant's cross-examination of the confidential informants.

E. Did the District Court Err By Admitting Testimony Regarding Scope of Informant's Previous Confidential Informant Work and Compensation?

During opening statements, Torres's counsel mentioned that the Government had paid Guerrero $225,000 for his work as a confidential informant.

Defense counsel elicited testimony from Agent Tanner on cross-examination regarding the $225,000. On redirect, the government elicited from Tanner more specific information regarding the $225,000; specifically, Tanner testified about the cases for which Guerrero was compensated. Tanner mentioned the types of cases, the sums of drugs involved, and the amount of Guerrero's compensation. Neither Torres nor Ravelo objected to this testimony.

F. Did the District Court Err By Giving Improper Jury Instructions on Aiding and Abetting?

Torres argued at trial that the jury instruction on aiding and abetting was inappropriate and improperly reduced the government's burden of proof in a conspiracy case. The instruction was virtually identical to the jury instruction used in *United States v. Walker*, 621 F.2d 163, 165-66 (5th Cir. 1980). Based on *Walker*, we reject the objections raised by Torres at trial. Additionally, Torres asserts on appeal that the aiding and abetting instruction was erroneous because it did not require the jury to find the principal to have the requisite criminal intent. Since Torres failed to raise this objection at trial, we review only for plain error, which does not result. *See Mitchell*, 146 F.3d at 1342-43.

G. Did the District Court Err By Allowing Improper Prosecutorial Comments During Closing Arguments?

Appellants argue that the prosecutor made two separate statements during closing arguments which necessitate reversal. In the first statement at issue the

prosecutor argued:

> Now you ask, what's the harm that they'd agree to do this and they didn't get to carry it out? We contend to you that people don't come up to Customs and DEA and FBI, knock on the door, and say, "I want to tell you about these folks that are dealing inc rack cocaine and cocaine and marijuana and whatever."
>
> . . . .
>
> That's and example I gave to you, not that these people were involved in crack cocaine and marijuana, but that people don't come volunteer to law enforcement without some incentive on their part about illegal activity, no more than people don't talk about it until after they're caught ...

The prosecutor's second statement at issue was, "Evil triumphs when good men and women do nothing. You twelve people know where justice lies."

Appellant Torres correctly asserts that, "A prosecutor ... is forbidden to make improper suggestions, insinuations and assertions calculated to mislead the jury and may not appeal to the jury's passion or prejudice." *United States v. Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985) (internal quotations omitted). However, we have also held:

> [I]n the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. Our task is to determine the probable effect the improper comment had on the jury. In assessing whether the accused was actually prejudiced by improper argument, we consider the presence of curative instructions and the strength of the government's case.

Id. (internal citations and quotations omitted).

In *Rodriguez*, we upheld the defendant's conviction because: "[t]he district court instructed the jury three separate times that the argument of the attorneys was not evidence;" the "court also instructed the jury to disregard the prosecutor's comments immediately after they were challenged by defense counsel;" "the evidence of [defendant's] guilt was substantial, if not overwhelming;" and "any impropriety was isolated and certainly did not permeate the entire trial." *Id.* Likewise, in this case, the trial court sufficiently cured any error by noting throughout the trial and in the oral charge to the jury that the lawyers' statements were not evidence. Additionally, as with *Rodriguez*, the comments at issue did not permeate the entire trial, and substantial evidence supported the appellants' convictions Hence, the prosecutor's closing statements did not produce reversible error. *See United States v. Rodgers*, 981 F.2d 497, 499-500 (11th Cir. 1993) (holding., "For a

prosecutor's remark to offend due process, the remarks must be improper and a reasonable probability must exist that, but for the offending remarks, the defendant would not have been convicted," and upholding conviction supported by ample evidence where district court issued numerous curative instructions regarding lawyers' arguments.)

H. Did the District Court Err By Not Reducing Appellants' Sentences By Three Levels Pursuant to U.S.S.G. § 2X1.1(b)(2)?

Appellants argue that the district court erred by not reducing their sentences by three levels pursuant to U.S.S.G. § 2X1.1(b)(2), which provides for a three level decrease for a conspiracy offense "unless the defendant or co-conspirator completed all the acts the conspirators believed necessary ... for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control." U.S.S.G. § 2X1.1(b)(2) (1998). We review this United States Sentencing Guideline issue for plain error, since appellants failed to raise the issue at sentencing. *See United States v. Khawaja*, 118 F.3d 1454, 1458 (11th Cir. 1997).

The appellants' argument ignores U.S.S.G. § 2X1.1(c) which provides, "[w]hen an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section." U.S.S.G. § 2X1.1(c) (1998). We have

elaborated, "where the statutory section defining the offense of conviction prohibits conspiracy, and that section is expressly covered by a particular guideline, the offense level provided by that guideline is controlling, and U.S.S.G. § 2X1.1 does not apply." *United States v. Thomas*, 8 F.3d 1552, 1565 (11th Cir. 1993). Drug importation conspiracies are prohibited by 21 U.S.C. § 952(a) and 21 U.S.C.§ 963, and are specifically covered by U.S.S.G. § 2X1.1. Therefore, pursuant to U.S.S.G. § 2X1.1(c)(1) and *Thomas*, appellants were not eligible for a § 2X1.1(b)(2) three-level reduction.

I. Did the District Court Clearly Err When It Attributed More Than 150 Kilograms of Cocaine to Defendants?

When calculating the appellants' base offense level under U.S.S.G. § 2D1.1, the probation officer attributed to them a drug quantity of more than 150 kilograms of cocaine as relevant conduct. Both appellants objected, asserting that there was no evidence that they were capable of or intended to provide more than 150 kilograms of cocaine as required under U.S.S.G. § 2D1.1, comment. (N.12). The government bears the burden of establishing the drug quantity by a preponderance of the evidence. *See United States v. Mertilus*, 111 F.3d 870, 873 (11th Cir. 1997).

We review the district court's determination of the drug quantity used to establish a defendant's base offense level for clear error. *See United States v. Smith*, 51 F.3d 980, 981 (11th Cir. 1995).

The Sentencing Guidelines direct:

> In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level ... If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

U.S.S.G. § 2D1.1, comment. (N.12).

In a similar factual situation, we held, "it would have been impossible for the [district] court to have found that [the defendant] did not possess the intent to produce any drugs given the jury's guilty verdict on the sole count of conspiring to distribute the cocaine base. Otherwise, the district court would have had to throw out the conviction ... " *United States v. Williams*, 144 F.3d 1397, 1403 (11th Cir. 1998). Likewise, in another case where no cocaine was seized, we found no clear error where "[t]he preponderance of the evidence ... established that all of the appellants knew that the scheme entailed stealing 300 kilograms of cocaine." *United States v. Chirinos*, 112 F.3d 1089, 1103 911th Cir. 1997).

In this case, evidence showed that Ravelo had been in the importing business for five years, was able to describe in detail the plan necessary to complete the deal, gave Agent Tanner $15,000 cash to cover his expenses, was observed building secret compartments into a boat, and had $230,000 in cash on his person and in his residence at the time of his arrest. Base don this evidence, it was not error for the district court to find that Ravelo was capable of and intended to import the agreed upon amount - 150 - plus kilograms - of cocaine.

The evidence also demonstrates Torres's intent and capacity to import 150 - plus kilograms of cocaine. Torres had indicated to an informant that one of his boats would be used to import the cocaine, and he stated the he had the ability to import 300 kilograms of cocaine, The boats seized from his residence could conceal between 240 and 320 kilograms of cocaine a piece. This evidence adequately supports the district court's drug amount finding.

J. Did the District Court Err By Not Granting Torres a Mitigating-Role Reduction Pursuant to U.S.S.G. § 3B1.2?

We review a district court's determination of whether a defendant qualifies for a minor role reduction for clear error only. *See United States v. Rodriguez De Varon*, 175 F.3d 930, 934 (11th Cir.), *cert denied*, __ U.S. __, 120 S.Ct. 424 (1999). Torres, as the proponent of the downward adjustment, "bears the burden of proving a mitigating role in the offense vy a preponderance of the

evidence." *Id.* at 939. We will generally uphold the trial court's sentencing determination "[s]o long as the basis of the trial court's decision is supported by the record and does not involve a misapplication of a rule of law." *Id.* at 945. Because evidence demonstrated that Torres had knowledge of the conspiracy scheme, had stated that he had a boat capable of traveling long distances and modified to hide cocaine, and was found in possession of two such boats, the district court did not err by not giving Torres a minor or minimal role reduction.

III. CONCLUSION

Because we find no reversible error, we AFFIRM.

AFFIRMED.

CASE NO. 98-6681

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TONY RAVELO,
and ALEJANDRO TORRES,
Appellants/Defendants,

vs.

UNITED STATES OF AMERICA,
Appellee/Plaintiff.

On Appeal From The United States District Court For The Southern District of Alabama, Mobile Division, Criminal Division Case No. 96-Cr-181-1

PETITION FOR REHEARING OF APPELLANT, TONY RAVELO

Rhonda A. Anderson, Esq.
Rhonda A. Anderson, P.A.
Counsel for Tony Ravelo
2420 Coral Way
Miami, Florida 33145
Telephone: (305) 854-8529
Facsimile: (305) 848-8406

Arturo V. Hernandez, Esq.
Arturo V. Hernandez, P.A.
Counsel for Tony Ravelo
2420 Coral Way
Miami, Florida 33145
Telephone: (305) 854-8529
Facsimile: (305) 848-8406

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Appellant, Tony Ravelo, hereby certifies pursuant to Eleventh Circuit Rule 26-1.1 that the following is a complete list of persons and entities who have an interest in the outcome of this case.

Rhonda A. Anderson, Esq., Appellate Counsel
Jose R. E. Batista, Esq., Trial Counsel-Concepcion
Rhadames C. Batista, Esq., Trial Counsel-Ravelo
Miguel Ignacio Cabal, Codefendant
Orlando Concepcion, Codefendant
Hon. Robert L. Dubé, U.S. Magistrate Judge, So. Distr. Fla.
J. Don Foster, United States Attorney
Deborah A. Griffin, Assistant U.S. Attorney-Trial
Arturo V. Hernandez, Esq., Appellate Counsel
Charles A. Kandt, Esq., Assistant U.S. Attorney-Trial
Dinnis J. Knizley, Esq., Trial Counsel-Cabal
John H. Lipinski, Esq., Appellate Counsel-Torres
Hon. Bert W. Milling, Jr., U.S. Magistrate Judge
Tony Ravelo, Appellant/Defendant
E. T. Rolison, Jr., Esq., Assistant U.S. Attorney-Trial
H. Frank Rubio, Esq., Trial Counsel-Alejandro Torres
Marc V. Seibert, U.S. Probation Officer
Marcia G. Shein, Esq., Counsel for Sentencing-Ravelo
Hon. William H. Steele, U.S. Magistrate Judge
Alejandro Torres, a/k/a Alex, Codefendant
Hon. Richard W. Vollmer, Jr., U.S. District Court Judge
Thomas E. Scott, United States Attorney
Sheldon Robert Zilbert, Esq., Trial Counsel

Rhonda A. Anderson, Esq.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the type size and style in this brief is 14 point Times New Roman Scalable type.

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____ F.3d. ___, 2000 WL 988127 (8th Cir. July 18, 2000). 7

STATEMENT OF ADOPTION

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, and Local Rule 28(f), the Appellant Ravelo adopts any issues the Co-Appellant, Alejandro Torres, may raise in a petition for rehearing or rehearing *en banc* before this Court. Brief.

STATEMENT OF FACTS NECESSARY FOR REHEARING

The indictment charged Tony Ravelo with conspiracy to import cocaine in violation of Title 21 U.S.C. § 963, which imposes the penalty provisions of Title 21 U.S.C., § 960.

The jury instructions in the instant case specifically removed the issue of the quantity of drugs from the jury's consideration. The charge instructed the jury that it only had to find a "measurable amount" of cocaine was involved in the offense, but not more than 800 kilograms of cocaine, as the Indictment charged. The charge provided:

> ***The Government is not required to prove the actual amount of the controlled substance that was the object of the alleged conspiracy.*** The Government must prove beyond a reasonable doubt, however, that a measurable amount of the controlled substance was, in fact, the object of the alleged conspiracy.

(R_-_-15; R_-___)(emphasis added).

Therefore, the jury charge did not require the jury to determine whether a "measurable amount" of cocaine was "5 kilograms or more."

Testimony of Special Agent, Joseph Goulet

At trial, Agent Goulet testified that he examined three vessels seized at the time of the arrest of the defendants on October 29, 1997 – 13 months after the original indictment was filed. (R1-1,23,29). The Government offered no testimony or evidence to show that one of the vessels, a "Star Fire," was part of the conspiracy charged in the instant indictment. Based upon this lack of evidence, defense counsel vigorously objected to any testimony regarding the Star Fire. Defense counsel also asserted that the Government failed to provide any notice as required under Federal Rule of Evidence 404(b) that any such evidence would be offered at trial. (R9-424). Nevertheless, the District Court denied defense counsel's objections, ruling that such was not 404(b) evidence. (R9-424).

With respect to the open fisherman vessel, Mr. Goulet was unable to render any opinion that the vessel was fitted with concealed access compartments, because at the time of its seizure after Ravelo's arrest, the vessel was still incomplete. (R9-430,442).

In addition, with regard to the Gulfstream vessel, over defense counsel's objection, (R9-442), Mr. Goulet opined that a total of 692 kilograms could have been concealed in the ten bins or compartments in the vessel. (R9-451-53). However, Agent Goulet agreed that at the time he examined the vessel, the ten bins were not concealed, because they were open and on the top of the deck. (R9-481). In fact, ten plastic access hatches that were consistent with the size of the "concealed" bins in the top of the deck, were found laying in the same area where the boat was seized. (R9-482-83,485). Further, at

the time the vessel was seized, one of the hatches was placed over one of the bins. (R9-484).

Lastly, with respect to the Star Fire, over defense counsel's renewed objection that such evidence was irrelevant and unduly prejudicial based upon the lack of evidence showing that the vessel was involved in the charged conspiracy, (R9-453,463), Agent Goulet testified that the compartment he found could have held 300 to 320 kilogram sized packages. (R9-468).

ARGUMENT I

IN LIGHT OF *APPRENDI V. NEW JERSEY*, 530 U.S. ___, 120 S.Ct. 2348, 2000 WL 807189 (2000), THIS COURT SHOULD REHEAR THE APPELLANTS' ARGUMENT REGARDING THE DISTRICT COURT'S ERROR IN ASSESSING THAT THE CONSPIRACY INVOLVED AT LEAST 150 KILOGRAMS OF COCAINE, BECAUSE THE JURY MUST DETERMINE THE QUANTITY OF COCAINE.

After Ravelo filed his Initial Brief and Reply Brief, the Supreme Court issued its decision in ***Apprendi v. New Jersey,*** 530 U.S. ___, 120 S.Ct. 2348, 2000 WL 807189 (2000), holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

The jury instructions in the instant case specifically removed the issue of the quantity of drugs from the jury's consideration. The charge instructed the jury that it only had to find a "measurable amount" of cocaine was involved in the offense, but not more than 800 kilograms of cocaine, as the Indictment charged. The

charge provided:

> ***The Government is not required to prove the actual amount of the controlled substance that was the object of the alleged conspiracy.*** The Government must prove beyond a reasonable doubt, however, that a measurable amount of the controlled substance was, in fact, the object of the alleged conspiracy.

(R_-_-15; R_-___)(emphasis added).

As a result, the jury charge did not require the jury to determine whether a "measurable amount" of cocaine was "5 kilograms or more," – as is necessary to impose the greater penalty provisions of 21 U.S.C. § 960(b)(1)(B). Tony Ravelo was charged with conspiracy to import cocaine in violation of Title 21 U.S.C. § 963, which imposes the penalty provisions of Title 21 U.S.C., § 960. Section 960 provides that an individual who is convicted of a violation of 21 U.S.C. § 952 [importation], is only subject to the minimum mandatory provisions under section (B)(1)(B) if the quantity of drugs is "5 kilograms or more of a mixture of substance containing a detectible amount of ... cocaine....."

The instant case involved a dry conspiracy in which no cocaine was imported. Thus, the issue of what constituted a "measurable amount" of drugs was one of the central issues that the Government sought to show at trial with the alleged space that would have existed in hatches or compartments in an incomplete boat that the Government alleged would be used in the dry conspiracy. Moreover, the Government's evidence that the vessels they claimed were "involved" in the conspiracy, is at best, scant. First, the Government

offered no testimony or evidence to show that one of the vessels, a "Star Fire," was part of the conspiracy charged in the instant indictment. Based upon this lack of evidence, defense counsel vigorously objected to any testimony regarding the Star Fire.[3] (R9-453,463,468).

With respect to the open fisherman vessel, Mr. Goulet was unable to render any opinion that the vessel was fitted with concealed access compartments, because at the time of its seizure after Ravelo's arrest, the vessel was still incomplete. (R9-430,442).

In addition, with regard to the Gulfstream vessel, over defense counsel's objection, (R9-442), Mr. Goulet opined that a total of 692 kilograms could have been concealed in the ten bins or compartments in the vessel. (R9-451-53). However, Agent Goulet agreed that at the time he examined the vessel, *the ten bins were not concealed, because they were open and on the top of the deck.* (R9-481). In fact, ten plastic access hatches that were consistent with the size of the "concealed" bins in the top of the deck, were found laying in the same area where the boat was seized. (R9-482-83,485). Further, at the time the vessel was seized, one of the hatches was placed over one of the bins. (R9-484). Accordingly, the evidence showed that this vessel was not the vessel contemplated in the conspiracy charged.

Further, at sentencing, Tony Ravelo vigorously

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[3]Defense counsel also asserted that the Government failed to provide any notice as required under Federal Rule of Evidence 404(b) that any such evidence would be offered at trial. (R9-424). Nevertheless, the District Court denied defense counsel's objections, ruling that such was not 404(b) evidence. (R9-424).

disputed the drug quantity calculations that appeared in the Presentence Investigation Report. (R12-67-70). The Court denied said objection, and sentenced Mr. Ravelo under Criminal History Category I to life imprisonment together with a five year term of supervised release and a special assessment of $100.00. (R12-80-81; R1-159).

Aprendi applies to drug quantities that increase the penalty imposed. See ***United States v. Aguayo-Delgado,*** ___ F.3d ___, 2000 WL 988128 (8th Cir., July 18, 2000), ***United States v. Sheppard,*** ____ F.3d. ___, 2000 WL 988127 (8th Cir. July 18, 2000).

The appropriate relief under ***Apprendi*** is resentencing to the lesser provisions of the statute. See ***United States v. Henderson,*** ____ F. Supp. ___, 2000 WL 1006054 (S.D. W.Va. July 19, 2000)("[F]ailure to allege the specific drug amount in the indictment is not fatal and does not require dismissal of the criminal action, but instead merely limits punishment to the lowest statutory range provided by the statute. See generally ***United States v. Ubakanma,*** 215 F.3d 421, 2000 WL 749397 (4th Cri. June 12, 2000)(finding that the statutory aggravating fact, "affects a financial transaction," in 18 U.S.C. §3413 is an element of the offense, and vacating sentence and remanding to the district court for sentence pursuant to lesser felony provisions because the statutory aggravating circumstance was not alleged in the indictment); see also ***United States v. Jones,*** 172 F.3d 1115 (9th Cir. 1999)(on remand from the Supreme Court decision declaring that the federal carjacking statute sets forth three separate offenses, and remanding to the district court for resentencing)). Alternatively, the sentence of Ravelo should be vacated and the cause remanded for

further proceedings consistent with ***Apprendi.***

Tony Ravelo is entitled to the benefits of ***Apprendi*** in his direct appeal. See ***Griffith v. Kentucky,*** 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

Accordingly, the sentence of Tony Ravelo should be vacated and remanded for resentencing.

CONCLUSION

Based on the foregoing reasons and authorities, the Appellant, Tony Ravelo, respectfully requests that this be reversed and remanded for a new trial, or, alternatively, for resentencing.

Respectfully submitted,

_____

ARTURO V. HERNANDEZ, ESQ.

_____

RHONDA A. ANDERSON, ESQ.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and exact copy of the foregoing Petition for Rehearing containing 1,604 words (including all headings and the Statement of Adoption) was mailed this 20th day of August, 2000, ***Charles A. Kandt, Esq.,*** Assistant United States Attorney, Office of the United States Attorney, 63 South Royal Street, Riverview Plaza, Suite 600, Mobile, Alabama 36602, and ***John H. Lipinski, Esq.,*** *Attorney for Alejandro Torres,* 1455 N.W. 14th Street, Miami, Florida 33125.

ARTURO V. HERNANDEZ, P.A. RHONDA A. ANDERSON, P.A.

Arturo V. Hernandez, Esq.
2420 Coral Way
Miami, Florida 33145
Telephone: (305) 854-8529
Facsimile: (305) 858-8406
Florida Bar No: 324078

Rhonda A. Anderson, Esq.
2420 Coral Way
Miami, Florida 33145
Telephone: (305) 854-8529
Facsimile: (305) 858-8406
<rhoander@bellsouth.net>
Florida Bar No: 708038

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6681

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEJANDRO TORRES a.k.a.
ALEX, TONY RAVELO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Alabama

September 8, 2000

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants, Alejandro Torres and Tony Ravelo, are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6681
Non-Argument Calendar
District Court Docket No. 96-00181-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEJANDRO TORRES a.k.a.
ALEX, TONY RAVELO,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Alabama

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and were taken under submission by the Court upon the records and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of convictions of the said District Court and sentences imposed in these causes be and the same are hereby AFFIRMED.

ENTERED: July 31, 2000
For the Court: Thomas K. Kahn, Clerk
By: Matt Davidson s/s
Deputy Clerk

ISSUED AS MANDATE: SEPT. 20, 2000

21 U.S.C. § 952.
Importation of controlled substances

(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that--

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States--

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) In any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may

be so imported for the purpose of manufacturing heroin or smoking opium.

(b) Nonnarcotic controlled substances in schedule III, IV, or V

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance--

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification, or declaration, or in the case of any nonnarcotic controlled substance in schedule III, such import permit, notification, or declaration, as the Attorney General may by regulation prescribe, except that if a nonnarcotic controlled substance in schedule IV or V is also listed in schedule I or II of the Convention on Psychotropic Substances it shall be imported pursuant to such import permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention.

(c) Coca leaves

In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

21 U.S.C. § 960. Prohibited acts A

(a) Unlawful acts

Any person who--

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving--

(A) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 50 grams or more of a mixture or substance

described in subparagraph (B) which contains cocaine base;

(D) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(G) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a

prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. Any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(2) In the case of a violation of subsection (a) of this section involving--

(A) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(B) 500 grams or more of a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and

salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 5 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

(D) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl) -4-piperidinyl] propanamide;

(G) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

the person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed

the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this paragraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or flunitrazepam, the person committing such violation shall, except as provided in paragraphs (1), (2), and (4),

be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(4) In the case of a violation under subsection (a) of

this section with respect to less than 50 kilograms of marihuana, except in the case of 100 or more marihuana plants regardless of weight, less than 10 kilograms of hashish, less than one kilogram of hashish oil, or any quantity of a controlled substance in schedule III, IV, or V, (except a violation involving flunitrazepam and except a violation involving gamma hydroxybutyric acid) the person committing such violation shall be imprisoned not more than five years, or be fined not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a term of supervised release of not less than two years if such controlled substance is in schedule I, II, III, or (B) a term of supervised release of not less than one year if such controlled substance is in schedule IV.

U.S.S.G. § 2D1.1

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of

methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(6) If the defendant meets the criteria set forth in subdivisions (1) to (5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.

(c) DRUG QUANTITY TABLE

	Controlled Substances and Quantity	**Base Offense Level**
1	•30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); •150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •1.5 KG or more of Cocaine Base; • 30 KG or more of PCP, or 3 KG or more of PCP (actual); •15 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of Ice";	**Level 38**

	Controlled Substances and Quantity	Base Offense Level
	•300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •12 KG or more of Fentanyl; •3 KG or more of a Fentanyl Analogue; •30,000 KG or more of Marihuana; •6,000 KG or more of Hashish; •600 KG or more of Hashish Oil.	
2	•At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 500 G but less than 1.5 KG of Cocaine Base; •At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); •At least 5 KG but less than 15 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Methamphetamine (actual), or at least 1 KG but less than 3 KG of Ice";	Level 36

	Controlled Substances and Quantity	Base Offense Level
	•At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 4 KG but less than 12 KG of Fentanyl; •At least 1 KG but less than 3 KG of a Fentanyl Analogue; •At least 10,000 KG but less than 30,000 KG of Marihuana; •At least 2,000 KG but less than 6,000 KG of Hashish; •At least 200 KG but less than 600 KG of Hashish Oil.	
3	•At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 150 G but less than 500 G of Cocaine Base; •At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);	**Level 34**

	Controlled Substances and Quantity	Base Offense Level
	•At least 1.5 G but less than 5 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice"; •At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 1.2 KG but less than 4 KG of Fentanyl; •At least 300 G but less than 1 KG of a Fentanyl Analogue; •At least 3,000 KG but less than 10,000 KG of Marihuana; •At least 600 KG but less than 2,000 KG of Hashish; •At least 60 KG but less than 200 KG of Hashish Oil.	
4	•At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 50 G but less than 150 G of Cocaine Base;	**Level 32**

	Controlled Substances and Quantity	Base Offense Level
	•At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual); •At least 500 G but less than 1.5 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 but less than 300 G of "Ice"; •At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 400 G but less than 1.2 KG of Fentanyl; •At least 100 G but less than 300 G of a Fentanyl Analogue; •At least 1,000 KG but less than 3,000 KG of Marihuana; •At least 200 KG but less than 600 KG of Hashish; •At least 20 KG but less than 60 KG of Hashish Oil.	
5	•At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);	**Level 30**

Controlled Substances and Quantity	Base Offense Level
•At least 3 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 35 G but less than 50 G of Cocaine Base; •At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual); •At least 350 G but less than 500 G of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice"; •At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 280 G but less than 400 G of Fentanyl; •At least 70 G but less than 100 G of a Fentanyl Analogue; •At least 700 KG but less than 1,000 KG of Marihuana; •At least 140 KG but less than 200 KG of Hashish; •At least 14 KG but less than 20 KG of Hashish Oil.	

	Controlled Substances and Quantity	Base Offense Level
6	•At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 20 G but less than 35 G of Cocaine Base; •At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); •At least 200 G but less than 350 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of "Ice"; •At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 160 G but less than 280 G of Fentanyl; •At least 40 G but less than 70 G of a Fentanyl Analogue;	**Level 28**

	Controlled Substances and Quantity	Base Offense Level
	•At least 400 KG but less than 700 KG of Marihuana; •At least 80 KG but less than 140 KG of Hashish; •At least 8 KG but less than 14 KG of Hashish Oil.	
7	•At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 5 G but less than 20 G of Cocaine Base; •At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual); •At least 50 G but less than 200 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of "Ice"; •At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);	**Level 26**

	Controlled Substances and Quantity	Base Offense Level
	•At least 40 G but less than 160 G of Fentanyl; •At least 10 G but less than 40 G of a Fentanyl Analogue; •At least 100 KG but less than 400 KG of Marihuana; •At least 20 KG but less than 80 KG of Hashish; •At least 2 KG but less than 8 KG of Hashish Oil.	
8	•At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 4 G but less than 5 G of Cocaine Base; •At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual); •At least 40 G but less than 50 G of Methamphetamine, or at least 8 G but less than 10 G of Methamphetamine (actual), or at least 8 G but less than 10 G of "Ice";	**Level 24**

	Controlled Substances and Quantity	Base Offense Level
	•At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 32 G but less than 40 G of Fentanyl; •At least 8 G but less than 10 G of a Fentanyl Analogue; •At least 80 KG but less than 100 KG of Marihuana; •At least 16 KG but less than 20 KG of Hashish; •At least 1.6 KG but less than 2 KG of Hashish Oil.	
9	•At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 3 G but less than 4 G of Cocaine Base; •At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);	**Level 22**

	Controlled Substances and Quantity	Base Offense Level
	•At least 30 G but less than 40 G of Methamphetamine, or at least 6 G but less than 8 G of Methamphetamine (actual), or at least 6 G but less than 8 G of "Ice"; •At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 24 G but less than 32 G of Fentanyl; •At least 6 G but less than 8 G of a Fentanyl Analogue; •At least 60 KG but less than 80 KG of Marihuana; •At least 12 KG but less than 16 KG of Hashish; •At least 1.2 KG but less than 1.6 KG of Hashish Oil.	
10	•At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 200 G but less than 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 2 G but less than 3 G of Cocaine Base;	**Level 20**

Controlled Substances and Quantity	Base Offense Level
•At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual); •At least 20 G but less than 30 G of Methamphetamine, or at least 4 G but less than 6 G of Methamphetamine (actual), or at least 4 G but less than 6 G of "Ice"; •At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 16 G but less than 24 G of Fentanyl; •At least 4 G but less than 6 G of a Fentanyl Analogue; •At least 40 KG but less than 60 KG of Marihuana; •At least 8 KG but less than 12 KG of Hashish; •At least 800 G but less than 1.2 KG of Hashish Oil; •40,000 or more units of Schedule I or II Depressants or Schedule III substances; •2,500 or more units of Flunitrazepam .	

	Controlled Substances and Quantity	Base Offense Level
11	•At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 1 G but less than 2 G of Cocaine Base; •At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual); •At least 10 G but less than 20 G of Methamphetamine, or at least 2 G but less than 4 G of Methamphetamine (actual), or at least 2 G but less than 4 G of "Ice"; •At least 200 MG but less than 400 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 8 G but less than 16 G of Fentanyl; •At least 2 G but less than 4 G of a Fentanyl Analogue; •At least 20 KG but less than 40 KG of Marihuana;	**Level 18**

	Controlled Substances and Quantity	Base Offense Level
	•At least 5 KG but less than 8 KG of Hashish; •At least 500 G but less than 800 G of Hashish Oil; •At least 20,000 but less than 40,000 units of Schedule I or II Depressants or Schedule III substances; •At least 1,250 but less than 2,500 units of Flunitrazepam.	
12	•At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 500 MG but less than 1 G of Cocaine Base; •At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual); •At least 5 G but less than 10 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";	**Level 16**

	Controlled Substances and Quantity	Base Offense Level
	•At least 100 MG but less than 200 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 4 G but less than 8 G of Fentanyl; •At least 1 G but less than 2 G of a Fentanyl Analogue; •At least 10 KG but less than 20 KG of Marihuana; •At least 2 KG but less than 5 KG of Hashish; •At least 200 G but less than 500 G of Hashish Oil; •At least 10,000 but less than 20,000 units of Schedule I or II Depressants or Schedule III substances; •At least 625 but less than 1,250 units of Flunitrazepam.	
13	•At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	**Level 14**

Controlled Substances and Quantity	Base Offense Level
•At least 250 MG but less than 500 MG of Cocaine Base;	
•At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual); •At least 2.5 G but less than 5 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice"; •At least 50 MG but less than 100 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •At least 2 G but less than 4 G of Fentanyl; •At least 500 MG but less than 1 G of a Fentanyl Analogue; •At least 5 KG but less than 10 KG of Marihuana; •At least 1 KG but less than 2 KG of Hashish; •At least 100 G but less than 200 G of Hashish Oil;	
•At least 5,000 but less than 10,000 units of Schedule I or II Depressants or Schedule III substances;	

	Controlled Substances and Quantity	Base Offense Level
	• At least 312 but less than 625 units of Flunitrazepam.	
14	•Less than 5 G of heroin (or the equivalent amount of other Schedule I or II Opiates); •Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •Less than 250 MG of Cocaine Base; •Less than 5 G of PCP, or less than 500 MG of PCP (actual); •Less than 2.5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of "Ice"; •Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); •Less than 2 G of Fentanyl; •Less than 500 MG of a Fentanyl Analogue; •At least 2.5 KG but less than 5 KG of Marihuana;	Level 12

Controlled Substances and Quantity	Base Offense Level
•At least 500 G but less than 1 KG of Hashish; •At least 50 G but less than 100 G of Hashish Oil; •At least 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances; •At least 156 but less than 312 units of Flunitrazepam;	
•40,000 or more units of Schedule IV substances (except Flunitrazepan).	

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(3)

No. 00-965

In the Supreme Court of the United States

TONY RAVELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the district court committed plain error by sentencing petitioner to life imprisonment in accordance with 21 U.S.C. 960(b)(3) (1994 & Supp. IV 1998), based on the court's finding that petitioner's offense involved at least 150 kilograms of cocaine.

2. Whether petitioner is entitled to reversal of his conviction on the ground that the indictment failed to allege the quantity of drugs involved in his offense.

3. Whether the district court, in the absence of a jury finding as to the drug quantity involved in the offense, erred in enhancing petitioner's offense level under the Sentencing Guidelines based on the court's drug quantity determination at sentencing.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-43) is not reported, but the decision is noted at 229 F.3d 1166 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 59) was entered on July 31, 2000. A petition for rehearing was denied on September 8, 2000 (Pet. App. 58). The petition for a writ of certiorari was filed on December 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Alabama, petitioner was convicted of conspiring to import cocaine into the United States, in violation of 21 U.S.C. 963. Pet. App. 12-13. He was sentenced to life imprisonment. *Id.* at 14. The court of appeals affirmed. *Id.* at 27-43.

1. Petitioner participated in a scheme to import a large quantity of cocaine from Panama into the United States by concealing the cocaine within secret compartments in one or more recreational speed boats. Pet. App. 28-30. An indictment issued by a federal grand jury charged that petitioner and three co-defendants

> did willfully, knowingly and unlawfully combine, conspire, confederate and agree with each other and with divers other persons * * * to * * * unlawfully import more than eight hundred kilograms of cocaine, a Schedule II controlled substance, into the United States of America from the Republic of Panama, in violation of Title 21, United States Code, Section 952(a).

Id. at 8.[1] Section 952(a) of Title 21 states categorically, without reference to the quantity of drugs involved, that "[i]t shall be unlawful to import into" the United States any Schedule I or II controlled substance. 21 U.S.C. 952(a). Section 960(b) of Title 21 establishes

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[1] All references in this brief to "the indictment" refer to the second superseding indictment on which petitioner was ultimately found guilty by the jury. See Pet. App. 7-11. The pertinent language in the conspiracy count, however, remained the same in all versions of the indictment. See *id.* at 1-3 (initial indictment); *id.* at 4-6 (first superseding indictment).

penalties for the importation offense based on (*inter alia*) the type and quantity of drugs involved. 21 U.S.C. 960(b) (1994 & Supp. IV 1998). Section 963 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. 963.

2. Following a jury trial, petitioner was convicted on the conspiracy charge. Pet. App. 12-13. The jury was not required to determine the quantity of cocaine involved in the conspiracy. See Pet. 22 n.15 (explaining that the pertinent instruction required the jury to find that the importation of "a measurable amount of the controlled substance" was the object of the conspiracy).

The district court sentenced petitioner to life imprisonment. Pet. App. 14. Under 21 U.S.C. 960(b)(1)(B), a defendant convicted of an importation offense involving five kilograms or more of a mixture or substance containing a detectable amount of cocaine is subject to "a term of imprisonment of not less than 10 years and not more than life." The district court found at sentencing that petitioner "was involved with at least 150 kilograms of cocaine during the conspiracy." Pet. App. 24; see Sentencing Guidelines (Guidelines) § 2D1.1(c)(1) (establishing a base offense level of 38 for drug offenses involving 150 kilograms or more of cocaine).

3. The court of appeals affirmed. Pet. App. 27-43. As relevant here, the court of appeals rejected petitioner's argument that the evidence was insufficient to support the district court's drug quantity determination at sentencing. *Id.* at 40-42. In a petition for rehearing, petitioner argued for the first time that his life sentence was invalid because the district court

rather than the jury had determined the quantity of drugs involved in his offense. *Id.* at 51-55. The petition for rehearing was denied. *Id.* at 58.

DISCUSSION

1. Petitioner argues (Pet. 20-23) that his life sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the district court rather than the jury determined the quantity of drugs involved in his offense. In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

Petitioner's drug importation offense was subject to the graduated penalties set forth in 21 U.S.C. 960(b) (1994 & Supp. IV 1998). See 21 U.S.C. 963 (providing that one who conspires to import cocaine is subject to the same penalties that are established for the substantive offense). Section 960(b)(3) authorizes "a term of imprisonment of not more than 20 years" for a covered offense involving *any* amount of cocaine. 21 U.S.C. 960(b)(3) (1994 & Supp. IV 1998). Section 960(b)(2) increases the statutory maximum to 40 years' imprisonment when the offense involves 500 grams or more of a mixture or substance containing a detectable amount of cocaine. 21 U.S.C. 960(b)(2) (1994 & Supp. IV 1998). Section 960(b)(1), in turn, authorizes a maximum term of life imprisonment where the offense involves five kilograms or more of such a mixture or substance. 21 U.S.C. 960(b)(1) (1994 & Supp. IV 1998).

Petitioner was sentenced to life imprisonment, pursuant to Section 960(b)(1), based on the district court's finding that his offense involved 150 kilograms or more

of cocaine. The jury, however, was not asked to make any determination on the quantity of drugs involved in petitioner's offense. Imposition of a sentence of more than 20 years' imprisonment on the basis of a drug quantity determination made by the district court was error under this Court's decision in *Apprendi*.

Petitioner, however, did not raise his constitutional claim in the district court. The claim therefore may be reviewed only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), cert. denied, 121 S. Ct. 834 (2001); *United States* v. *Nordby*, 225 F.3d 1053, 1060 (9th Cir. 2000). The error in imposing a life sentence based on drug quantity findings made by the district court at sentencing is "plain," in that it is "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."); *Nordby*, 225 F.3d at 1060. A showing that the district court committed "plain error" in sentencing petitioner will not entitle him to relief, however, unless he can also demonstrate both that the error "affect[ed] substantial rights" and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). Under the circumstances, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance.

2. Petitioner contends (Pet. 23-26) that his conviction should be reversed because the indictment failed to allege the specific quantity of cocaine that petitioner conspired to import. He argues (Pet. 26) that

"the district court was without jurisdiction to try or sentence [petitioner], because the grand jury did not charge [petitioner] with an essential element of the offense charged." That claim was not presented to the courts below and is therefore reviewable only under a plain-error standard. In any event, the claim lacks merit.

The indictment in this case did allege a drug quantity that was more than sufficient to support an enhanced sentence under 21 U.S.C. 960(b)(1) (1994 & Supp. IV 1998). Under that provision, a defendant is exposed to a maximum term of life imprisonment where the offense involves, *inter alia*, five kilograms or more of a mixture or substance containing cocaine. In this case, the indictment alleged that petitioner participated in a conspiracy to "knowingly and intentionally unlawfully import more than *eight hundred kilograms of cocaine*, a Schedule II controlled substance, into the United States of America from the Republic of Panama, in violation of Title 21 United States Code, Section 952(a)." Pet. App. 8 (emphasis added). Even if petitioner were correct that an allegation as to quantity is necessary to impose an enhanced sentence, see Pet. 21, the indictment in this case alleged more than the five kilograms of cocaine necessary to support a maximum life sentence under Section 960(b)(1).[2]

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[2] The district court found at sentencing that petitioner "was involved with at least 150 kilograms of cocaine during the conspiracy." Pet. App. 24. That amount, though less than the figure alleged in the indictment, is also more than sufficient to support an enhanced sentence under Section 960(b)(1). And an indictment is not deemed to be constructively amended simply because the proof supports some but not all of the quantity alleged. Cf. *United States* v. *Miller*, 471 U.S. 130 (1985) (no violation of the Fifth Amendment Grand Jury Clause when a jury finds guilt based on

Moreover, even if petitioner were correct in characterizing drug quantity as an element of the enhanced drug importation and conspiracy offenses,[3] and even if the indictment in this case had contained no allegation as to drug quantity, there would be no basis for reversal of petitioner's conviction. As we explain above (see pp. 2, 4, *supra*), conspiracy to import *any* amount of cocaine is a federal crime punishable by up to 20 years' imprisonment. Thus, without regard to any reference to drug quantity, the indictment in this case alleged every element of a federal offense. The absence of any allegation as to drug quantity could at most (but see note 3, *supra*) constitute a failure to allege an essential element of the *enhanced* offense. But whatever effect

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trial proof that supports a fraudulent scheme that is significantly narrower than, but included in, the scheme described in the indictment).

[3] We disagree with petitioner's contention that the quantity of a controlled substance involved in an importation conspiracy is an element of the offense. The specific quantity of a controlled substance involved in an importation offense becomes relevant only in applying 21 U.S.C. 960(b) (1994 & Supp. IV 1998), which is entitled "Penalties." The quantity of drugs involved in a violation of Section 963 is a statutory sentencing factor, not an element of the offense with which a defendant is charged. Nothing in *Apprendi* alters that analysis. *Apprendi* did not hold that every fact that increases the maximum sentence for a crime is an element of the offense. Rather, the Court held that because sentencing factors that increase the statutory maximum penalty are "functional equivalent[s]" of offense elements, they must be found by the jury beyond a reasonable doubt. See 120 S. Ct. at 2365 n.19 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."). Nor did *Apprendi*, which involved a challenge to a state conviction, present any issue concerning the sufficiency of an indictment. See *id.* at 2355 n.3.

the absence of such an allegation might have on the district court's authority to impose the graduated penalties established by 21 U.S.C. 960(b)(1) and (2) (1994 & Supp. IV 1998), it could provide no basis for reversal of petitioner's conviction.[4]

3. Contrary to petitioner's suggestion (Pet. 27), there was no error under *Apprendi* in the district court's calculation of petitioner's Sentencing Guidelines offense level based on the court's determination that the offense involved 150 kilograms or more of cocaine. See Guidelines § 2D1.1(c)(1) (establishing a base offense level of 38 where the offense involves 150 kilograms or more of cocaine). This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so long as the sentence ultimately imposed falls within the range authorized by statute, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct *the judge* * * * to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind").

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[4] Petitioner also observes (Pet. 24) that the indictment in this case did not cite any of the specific penalty provisions in 21 U.S.C. 960 (1994 & Supp. IV 1998). The language of the indictment alleged facts sufficient to charge the offense, however, and the lack of a specific citation to the penalty provision is not significant. See Fed. R. Crim. P. 7(c)(3) (providing that even a citation to the wrong statute in an indictment is not grounds for reversal of a conviction unless the defendant was misled to his prejudice).

The Sentencing Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-157 (1997) (per curiam). Moreover, district courts have the power to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). *Apprendi* does not cast doubt on the continuing vitality of those precedents. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515). Because specific offense characteristics and sentencing adjustments under the Guidelines cannot lead to the imposition of a punishment above the statutory maximum, see Guidelines § 5G1.1(a); *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"), and because the Guidelines leave the sentencing court with significant discretion to choose an appropriate sentence within the statutory range, the use of judicial findings of fact as predicates for Guidelines sentencing creates no constitutional infirmity.

CONCLUSION

With respect to the first question presented in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In all other respects, the petition should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BROWN
Attorney

FEBRUARY 2001

with respect to the first question p